

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

WALZ MASONRY, INC.

and

Case 17-CA-18092

LABORERS' INTERNATIONAL UNION
OF NORTH AMERICA, LOCAL NO. 1140

Stephen E. Wamser, Esq.,
of Overland Park, KS,
for the General Counsel.

Greg A. Naylor, Esq.,
of Des Moines, IA,
for the Respondent.

M. H. Weinberg, Esq.,
of Omaha, NE,
for the Charging Party.

DECISION

Statement of the Case

MARTIN J. LINSKY, Administrative Law Judge. On June 15, 1995 a charge in Case 17-CA-18092 was filed by Laborers Local 1140, Union herein, against Walz Masonry, Inc., Respondent herein.

On February 14, 1996, the National Labor Relations Board, by the Regional Director for Region 17, issued a Complaint alleging that Respondent violated Sections 8(a)(1) and (3) of the National Labor Relations Act, herein the Act, when on June 6, 1995, it told union affiliated applicants for employment that it was non-union and did not hire union members and when it refused to consider for employment and refused to hire 10 applicants for employment because of their affiliation with a Union.

Respondent filed an Answer in which it denied that it violated the Act in any way.

A hearing was held before me on November 5 and 6, 1996, in Omaha, Nebraska, and Council Bluffs, Iowa.

Upon the entire record in this case, to include post hearing briefs submitted by the General Counsel, Respondent, and the Charging Party, and upon my observation of the demeanor of the witnesses, I hereby made the following:

Findings of Fact

I. Jurisdiction

5 Respondent, a corporation, with an office and place of business in Omaha, Nebraska, is engaged as a masonry contractor in the construction industry doing commercial and industrial construction.

10 Respondent admits, and I find, that at all material times it has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Labor Organization Involved

15 Respondent admits, and I find, that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

20 Respondent is a non-union masonry contractor who placed want ads in the Omaha World Herald that ran from May 12 to May 18, 1995, June 1 to June 7, 1995, June 13 to June 19, 1995, and June 25 to July 2, 1995 which stated "Mason Laborers Wanted. Experienced only, \$9/hr."

25 On June 6, 1995 10 members of the Union went to Respondent's office located in a remote section of west Omaha to apply for employment. They were Kevin Sunderman, Jay Denney, Ruben Escobar, Craig Sunderman, Jeff Haith, Cliff Barnhart, Randy Weiss, Rick Inskeep, Tim Benesch, and Rod Edmonds. Two of the ten testified before me, i.e., Kevin Sunderman and Jay Denney. Both men impressed me as credible witnesses. These 10 men were referred to in this litigation as the overt salts. Earlier on June 6, 1995, two covert salts applied for work and after the 10 overt salts tried to apply for work with Respondent two more covert salts went to apply. A salt being a person who seeks employment with a non-union employer in order to organize its work force.

35 Sunderman and Denney testified that they and 8 other members of the Union went to Respondent's office to apply for positions that had been advertised in the paper. They wore union hats and jackets and told the people at Respondent's office that they were union, wanted to apply for work, and, if hired, would try to organize Respondent's employees.

40 The owner of Respondent is Charles Walz. He was not present in the office when the 10 applicants arrived but his wife, Linda Walz, Vice President and Secretary of Respondent, and his daughters, Jennifer Walz, a secretary, and Jacqueline Coco, Respondent's bookkeeper, were present. All three women were stipulated by Respondent to be agents within the meaning of Section 2(13) of the Act.

45 Suffice it to say Respondent's hiring procedure, when Charles Walz is not present, is as follows: the women in the office have the applicants fill out applications and the applications are later reviewed by Charles Walz and he decides who is hired.

According to Kevin Sunderman and Jay Denney, whom I credit, the men said they were Union and were there to apply for jobs but were not given applications to fill out.

According to Linda Walz, Jennifer Walz, and Jacqueline Coco the men said they were from the Union and were there to reorganize the company and to take it over. Sunderman and Denney credibly testified that no one said they were there to reorganize the company or to take over the company. I credit Sunderman and Denney over the women.

With respect to whether or not the union applicants were able to submit applications Linda Walz testified that she told her daughter to give the men applications to fill out and Jacqueline Coco testified that she got a hand full of 10 to 12 applications and offered them to one of the Union applicants but neither he nor any of the other nine men accepted the offer of applications. Jennifer Walz was not in the office the entire time and did not see Coco offer applications or hear her mother tell Coco to do so.

Sunderman and Denney testified that no applications were offered to them.

I reject the testimony of Linda Walz, Jennifer Walz, and Jacqueline Coco in so far as it conflicts with the testimony of Kevin Sunderman and Jay Denney. I found them more credible than the women. The bottom line is the ten Union applicants were not given job applications to fill out.

Kevin Sunderman tape recorded what occurred at Respondent's office. A copy of a copy of the tape was turned over to Respondent's attorney prior to the hearing. The copy of the copy of the tape was thereafter turned over to Stephen Cain, an expert in audio tape analysis. Cain testified at the hearing before me that he found a number of anomalies on the copy of the copy of the original type that he examined and concluded that the integrity of the original tape may have been tampered with, i.e., it was possible that parts of the original tape were deleted or parts added to the tape. He could not give a definitive opinion without examining the original tape and the recording device used. Such an examination would take two days and cost \$5,000, which would be in addition to his fee up to that point of \$6,000 to \$7,000. Before the hearing Cain told Respondent's counsel that he wanted to examine the original tape and the recording device but had not been given them. Respondent did not move for a continuance at the end of the hearing to permit such an examination but the Union did request a continuance to conduct its own scientific test of the original type and recording device. I denied the request for a continuance because I felt it would unduly delay the outcome of this case. I could decide what occurred at Respondent's office on June 6, 1995 based on the testimony of the five witnesses who testified concerning the encounter.

Suffice it to say the copy of the tape in evidence and the transcript also in evidence corroborated the testimony of Sunderman and Denney but because of Stephen Cain's testimony I am giving no weight, except as noted in footnote 1, to the tape and its transcript but am deciding what occurred based on the witness' testimony and their demeanor. I would note that I credit the testimony Kevin Sunderman that he did not tamper with the tape and what is on the tape and the transcript of it comport with his recollection of what occurred.

The ten applicants who went to Respondent's office were bona fide applicants for employment – there being no evidence whatsoever to the contrary – and Respondent refused to let them submit applications for employment because of their union affiliation. This constitutes a violation of Section 8(a)(1) and (3) of the Act. See, *NLRB v. Town and Country Electric, Inc.*, 116 S. Ct. 450 (1995), *BE&K Construction Co.*, 321 NLRB No. 83 (1996), and *Casey Electric*, 313 NLRB 774 (1995).

Want ads for laborers appeared in the local paper before and after June 6, 1995 when the ten applicants went to apply for work. In addition, as noted above, the Union not only sent

in the ten overt salts, who are the discriminatees in this case, who wore union hats and jackets and who said they were Union and wanted to organize Respondent and were denied the opportunity to submit applications but the Union also sent in so called covert salts on June 6, 1995 both before and after the ten overt salts went to apply.

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Prior to Sunderman and the other nine men going to Respondent's office two union members, Gregory Scott Ebler and David Kilpatrick, who were not wearing Union indicia and who did not say they were with the Union, applied for work. Both Ebler and Kilpatrick were given applications to fill out by Jennifer Walz, they did so and handed them in to her. Neither

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After the ten overt salts were refused the opportunity to fill out applications two more covert salts, Gary Hansen and Benny DeSilva, went to Respondent's office, said they wanted to apply for work and were given, again by Jennifer Walz, applications which they filled out and handed in. Indeed, Hansen was told by Jennifer Walz that there was work and Respondent was hiring. Neither Hansen nor DeSilva were contacted or offered employment.

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The contrast in Respondent's treatment of the four covert salts, not identified as union affiliated, who were given applications to fill out, and the ten overt salts who were identified as union affiliated, but were not given applications to fill out establishes discrimination in the hiring process based on union affiliation.

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Other evidence of discrimination in hiring is when Linda Walz asked the ten overt salts to give her their name and number because she was going to turn them in to the Masonry Contractors Association. Rod Edmonds was the only one to give her a name and number. The number he left was the telephone number for the Union. When Charles Walz returned to the office later on June 6, 1995 he called the number and left a message for Edmonds that the position was filled. Apparently a position was filled by the hiring of Michael Rader by June 5, 1995 but Edmonds was never told that his name would be kept on file for a future opening.

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Charles Walz testified that he employed 24 people in his company to include 11 laborers and that he is always looking to hire laborers. Indeed between June 6, 1995 and October 11, 1996 he hired 39 laborers. More specifically, and because Walz testified applications for employment were active for 30 days, Respondent's records reflect that laborers were hired by Respondent as follows:

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June 14, 1995 - James Kuehn

June 20, 1995 - Jesus Bautist
Jose Jimenez

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June 22, 1995 - Tim Kavan

June 27, 1995 - Eduardo Soto Sanchez
John Kreikemeir

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Accordingly, it appears that six laborers were hired during the time that the ten overt salt applicant's applications would have been active if Respondent did not violate the Act in refusing to let the ten overt salts even fill out applications. In addition, two laborers were hired in July 1995, one in August 1995, two in August 1995, six in October 1995, and two in November 1995.

In light of the above, it is my conclusion that Respondent violated Section 8(a)(1) and (3) of the Act when it unlawfully refused to accept applications from the ten overt salts on June 6, 1995. All ten were experienced mason laborers except Randy Weiss and Tim Benesch. Weiss and Benesch were, however, experienced laborers. Respondent advertised for experienced mason laborers but hired Marc Zebley who had no experience as a laborer. Since there were six positions for laborers filled within the 30 day period following the time Respondent unlawfully refused to permit the filing of job applications by the ten overt salts offers of jobs and backpay should be made to six of the ten discriminatees. Which six are offered employment and backpay can be determined at the time of compliance.¹

Conclusions of Law

1. Walz Masonry , Inc., Respondent herein, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Laborers Local 1140, Union herein, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent on June 6, 1995 violated Section 8(a)(1) and (3) of the Act when it refused to consider for employment Kevin Sunderman, Jay Denney, Ruben Escobar, Craig Sunderman, Jeff Haith, Cliff Barnhart, Randy Weiss, Rick Inskeep, Tim Benesch and Rod Edmonds because of their union affiliation.

¹ 1. It is alleged that Jacqueline Coco informed employees that Respondent was non-union and did not hire union supporters or members. Jay Denney heard a women say this but couldn't say which one. The transcript of the tape contains the following exchange:

Kevin: Hi, I'm uh, Kevin Sunderman, and, uh, we're representin' Laborer's Local 1140.

Speaker1: We're not interested. (inaudible)

Kevin: We got an ad out of the paper sayin' that you (inaudible)

Speaker1: We're not union. We're non-union.

Kevin: So you won't take applications from union people.

Speaker1: Uh huh.

Kevin: What's your name?

Speaker1: Jackie

Kevin: Jackie

I listened to the tape at the hearing in the presence of Respondent's expert and all counsel but did not hear anyone say "Uh huh," which is attributable to Jacqueline Coco. Accordingly, I will not find a Section 8(a)(1) violation.

4. The Respondent on and after June 6, 1995 in the case of six of the ten discriminatees listed in 3, above, violated Section 8(a)(1) and (3) of the Act when it failed and refused to hire them because of their union affiliation.

5. The unfair labor practices found above are unfair labor practices having an effect on commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

ORDER

The Respondent, Walz Masonry, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from

(a) Failing and refusing to consider for employment applicants for employment because of their union affiliation.

(b) Failing and refusing to hire applicants for employment because they are members of a Union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order offer six of the ten discriminatees the jobs which they were denied the opportunity to apply for or, if those jobs no longer exist, to substantially equivalent positions at new job sites, if necessary and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. Backpay to be computed on a quarterly basis as prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(b) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days after service by the Region post at its facility in Omaha, Nebraska, and all other places where notices customarily are posted, copies of the attached notice marked

² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

“Appendix.”³ Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees customarily are posted. Reasonable
5 steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material. In the event that the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 6, 1995.

10 (d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

15 Dated, Washington, D.C. January 29, 1997.

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Martin J. Linsky
Administrative Law Judge

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³ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading “POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD” shall read “POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.”

APPENDIX

NOTICE TO EMPLOYEES

5 Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

10 The National Labor Relations Board has found that we violated the National Labor Relations Act
and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

15 To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

20 WE WILL NOT fail and refuse to consider for employment or fail and refuse to hire applicants
for employment because they are members of a union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the
exercise of the rights guaranteed you by Section 7 of the Act.

25 WE WILL within 14 days from the date of this Order offer immediate employment to six of the
ten following applicants for employment i.e., Kevin Sunderman, Craig Sunderman, Jay Denney,
Ruben Escobar, Jeff Haith, Cliff Barnhart, Randy Weiss, Rick Inskeep, Tim Benesch, Rod
Edmonds and WE WILL make them whole for any loss of earnings and other benefits resulting
30 from our discrimination, less any net interim earnings, plus interest.

WALZ MASONRY, INC.

(Employer)

35 Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

40 This notice must remain posted for 60 consecutive days from the date of posting and
must not be altered, defaced, or covered with any other material. Any questions concerning this
notice or compliance with its provisions may be directed to the Board's Office, 8600 Farley
Street, Suite 100, Overland Park, Kansas 66212-4677, Telephone 913-236-3005.

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